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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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WILLIAM DURLING, for themselves and all others similarly situated, et al.,

Plaintiffs,

v. 16 Civ. 3592(CS)

CONFERENCE

PAPA JOHN'S INTERNATIONAL, INC.,

Defendant.

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United States Courthouse
White Plains, N.Y.
March 29, 2017

Before: THE HONORABLE JUDITH C. McCARTHY,

Magistrate Judge

APPEARANCES

FINKELSTEIN, BLANKINSHIP, FREI-PEARSON & GARBER, LLP
Attorneys for Plaintiffs
JEREMIAH LEE FREI-PEARSON

SEYFARTH, SHAW, LLP
Attorneys for Defendant
GERALD MAATMAN
BRENDAN SWEENEY
GINA MERRILL

*Proceeding recorded via digital recording device.

THE DEPUTY CLERK: In the matter of William Durling v. Papa John's International.

Counsel, please state your appearances for the record.

MR. FREI-PEARSON: Good afternoon, your Honor. Jeremiah Frei-Pearson on behalf of plaintiffs in the putative class.

And with me is Andrew C. White, who, as last time, has not yet been admitted, but we would respectfully request that he be permitted to attend.

THE COURT: Yes, he can attend.

MR. FREI-PEARSON: Thank you, your Honor.

THE COURT: Thank you.

Mr. White, are you going to be admitted soon?

MR. WHITE: Hopefully.

THE COURT: Good luck with that.

Okay, counsel.

MR. MAATMAN: Gerald Maatman, Seyfarth, Shaw, and I'm joined by Brendan Sweeney and Gina Merrill, on behalf of the defendant.

THE COURT: Good afternoon, counsel.

Okay. So this started as a regularly scheduled status conference, but an issue came up. A discovery dispute issue came up regarding the Perrin documents. What I would like to do is start with that issue. I have reviewed the

submissions on that. I would like to give each side some time to make further argument if you would like.

Since this is -- I believe it was plaintiffs who originally brought this. Yes. Docket number 136.

So, Mr. Frei-Pearson, if you would like to add anything to your letter or highlight anything for the Court -- unless this issue's been resolved since I received those letters.

MR. FREI-PEARSON: Unfortunately, it is not, your Honor.

We first asked for the Perrin documents in June and served document requests as soon as we were able seeking them. Defendants have raised numerous issues justifying the delay, and we respectfully seek a date certain for complete production.

You know, the issues just by delay have been the protective order in Perrin, the theory that they would be violating the privacy of plaintiffs in Perrin, so we had to get a stipulation from plaintiff's counsel in Perrin saying, no, the only things that were designated confidential in Perrin were things that were designated confidential by defendant; the potential that somehow privileged documents were produced in Perrin and might be produced to us, so they had to review each document for privilege; and then the latest version -- the latest issue is the potential date-range issue.

These are all documents that were produced in prior litigation about the very same unlawful conduct that's at issue here. They told Judge Seibel that they would produce them in July of 2016. They're still not produced. Now, I'll note that -- or many of them are still not produced. The majority of data, possibly all data, has now been produced.

I'll note that, two days before our last scheduled conference, before the snowstorm, they produced a massive amount of data from Perrin. We appreciate that, and we'll go through that. But, based on our review of the Perrin Bates numbers up against the Bates numbers that have been produced from Perrin to us, there are approximately 18,120 outstanding documents still, and there are less than 3,000 non-data Perrin documents that have been produced, meaning that we're still at less than 15 percent of the documents that aren't data having been produced. They proposed to review each of these documents ostensibly for date range, but it's been many, many months, and that review should have long occurred. And we were only told I think a couple months ago that that latest review was the latest reason for the delay.

And then to go to the substance of their purported concern about dates, these are all documents that relate to the exact same claim that is presently at issue. To the extent there is an early document, it's still relevant to the foundational policy that we're exploring. Defendants have

argued that the policy has changed, but the end result that the drivers are receiving, which is a per-delivery reimbursement, remains exactly the same.

And the purpose of having date limitations on discovery is to ease the burden. There's no burden associated with defendant making an immediate production. There isn't a burden associated with defendant reviewing each document for date range and withholding it from production. If that sort of request had been made to me in July or August, we would have been more amenable to it, but, at this point, after this extensive delay, we would respectfully request that they be ordered to immediately produce the remaining Perrin documents.

THE COURT: Okay. Thank you.

Who wants to talk on behalf of defendants?

MR. MAATMAN: Ms. Merrill.

MS. MERRILL: I will, your Honor.

The first thing I want to say is that we believe that this issue has largely been resolved with the large production of documents that we made not long before the last scheduled conference. There were approximately 144,800 documents produced in the Perrin litigation. The great, great majority of that was data. We have produced more than 144,000 of those documents to the plaintiffs. So there are several hundred -- I'm not sure of the exact number, but there are several hundred remaining documents that we are still reviewing. But, you

know, I think, for that reason, this issue has largely been resolved.

We would expect to complete review in the next couple weeks, and so that any documents that are within the statutory look-back period in this case, according to the ESI protocol, we would produce in the next few weeks.

THE COURT: So you're still limiting it. So this issue isn't moot because what the issue -- I mean, the issue of production and timeliness of production I'm not going to get into. You're continuing to produce. You're going to produce in the next couple weeks. But the issue of the range in which you're producing sounds like it's still at issue.

Plaintiffs want it not limited to the statutory time frame that's in the ESI production that deals with the discovery of documents that solely relate to the Durling matter. You're saying, if I'm hearing plaintiffs right and if -- I think I'm part -- you know, hearing from what you have said right now, is that you are only going to produce the Perrin documents for the -- under the statutory time frame in the ESI production that we have during Durling and you're not going to be producing all of the Perrin documents.

MS. MERRILL: That's correct.

THE COURT: Why?

MS. MERRILL: Because, your Honor, there's a statutory period at issue in this case.

THE COURT: For the records in Durling. I was involved in that. Very familiar with that. There was an argument that was made here ad nauseam where we got to the issue. And I limited it, but I didn't say it was a blanket end-all be-all. I said that, you know, this is where we were starting and there would be continuing discussion, even on just the Durling case records, that if there is problems going on, we would discuss that date range.

But that doesn't address the Perrin. So tell me why you shouldn't produce all the Perrin documents.

MS. MERRILL: Yes, your Honor.

Perrin had a totally different time period and a different policy at issue in that case. So the policy at PJI changed in the year 2012. Many of the documents produced in Perrin went all the way back to 2007. Given that, you know, we're agreeing to produce documents from May 13, 2010 forward, to the extent that documents are within that period and were produced in the Perrin litigation, we are turning them over here, but documents from before that period are simply not relevant to the PJI policy that is at issue in this lawsuit. As we said, the policy changed in the year 2012.

MR. FREI-PEARSON: Your Honor, two responses to that.

First of all, assuming counsel were correct that the policy changed in 2012, the statutory period goes back to prior to 2012 in this litigation, so I'm not sure what that gets

counsel.

Second, we don't agree with the policy change. In 2012, the drivers were reimbursed on a dollar-per delivery rate, a monetary amount for each delivery, which we believe and the Perrin plaintiffs believe was insufficient to compensate them for their actual expenses. In 2017, the drivers are reimbursed a dollar amount for each delivery which we believe is insufficient to compensate them for their policies.

Now, TJI's internal justifications have undoubtedly shifted over time. What PJI does is they consult with an outside company called Runzheimer to come up with a variety of justifications to justify the rate that they then reimburse the drivers at. And so their dialogue with Runzheimer has changed, and it's going to be interesting for us to see how that's changed over time, but the fundamental policy about which we are complaining remains exactly the same. And even if the policy had changed, we have claims in this case, including plaintiff Durling, that go back to prior to 2012. So I'm a little bit mystified.

I just also point out the reason why one has date limitations is to minimize burden. They already have these documents. By reviewing them for date range, they're creating burden. By just turning them over, there is no burden.

THE COURT: Ms. Merrill, do you want to be heard on that burden issue?

MS. MERRILL: The burden is in having to review documents, right? Within a certain time period, right? I mean, it doesn't -- for us to simply turn over the documents, the assumption that plaintiffs' counsel is making is that that means that we don't have to review them. Documents that are produced in this litigation and that are part of the record in this litigation, plainly defendant is going to review those documents, right? So just turning them over tomorrow doesn't minimize the burden because of course we're going to look at documents prior to turning them over to another side.

THE COURT: These are documents that have been produced already in another case.

MS. MERRILL: Correct, your Honor.

THE COURT: So they do not have to be reviewed prior to production. Yes, of course, in the course of litigation, you would have to review them because they're part of the -- they're part of the -- they'll become part of the documents in this case, and if you weren't involved in Perrin, you might want to review them. But when we look at burdensomeness under the Federal Rules and when we're looking at burdensomeness under the law, you're looking at the burdensomeness of the production, not the burdensomeness of the job of litigating the case. So you haven't mentioned the burdensomeness yet of production.

MS. MERRILL: And, your Honor, we are not making

burden arguments with regard to the Perrin documents. We're making arguments with regard to relevance. So I think the burden is maybe sort of tangential or a nonissue here. At the end of the day, we're just talking about several hundred more documents for review and production.

THE COURT: So what about plaintiffs' argument that some of the plaintiffs date back before 2012?

MS. MERRILL: So we are not saying that 2012 is going to be our date and we're not producing anything prior to 2012. We will go back to the statutory period, which is May 13, 2010. But I raise the 2012 change in policy because your Honor asked why is it that we wouldn't just turn everything over and, from our perspective, even going back to 2012, right? I mean, excuse me. Even going back to 2010, that's going to be addressing a different policy. But, look, we understand it's within the statutory period, and so we're going to turn it over. But when you're talking about documents prior to May 13, 2010, we don't see how they're relevant to this litigation.

THE COURT: If you want to respond.

MR. FREI-PEARSON: Sure.

Your Honor, Perrin was filed in 2009. I've actually asked counsel if any document productions were made in 2009. They weren't counsel in Perrin, so I don't believe that they've responded on that point.

But, again, I do not believe the policy has changed.

Certainly none of the drivers who have worked there full-time would say the policy has changed. They still get reimbursed exactly the same way.

To the extent an internal policy has changed, let's say there's a totally new policy in 2012, plaintiff Durling's claims go back to 2010. So, assuming that the policy was the same from 2009 to 2012, a 2009 document would plainly be relevant. Furthermore, if it's not relevant, we won't use it or it will not be helpful to us in the case. But the assumption should be that it's relevant because they all date with the exact same policy, which is how Papa John's reimburses its delivery drivers, and the internal methodology certainly doesn't appear to have changed at any juncture prior to 2012. And again, from our perspective, it's exactly the same.

And seeing how Papa John's internal methodology has changed is going to, we believe, go to willfulness because it's going to show that their internal methodology, when they claim they're changing the policy, every internal policy they have is aimed at justifying the low reimbursement rate they pay their drivers, which they have calculated saves them millions of dollars.

THE COURT: Okay. I'm prepared to rule on this. And I'm going to read my ruling now into the record.

Before the Court is plaintiffs' motion to compel discovery, which is docket number 136. Plaintiffs seek "all

nonprivileged documents produced by defendant in Perrin v. Papa John's International, Incorporated, case number 9 Civ. 1335 AGF, Eastern District of Missouri." Docket number 136, Exhibit A. Defendant argues that the production of documents from Perrin should be limited to documents from the relevant statutory period, which includes electronically stored information, hereinafter ESI, created or edited since May 13, 2010 and the documents outside of that period are "generally irrelevant and not discoverable." Docket numbers 138, paragraph 4(d) and 1379 at 1 to 2.

First, defendant mischaracterizes the Court's ruling on the record at the status conference held on January 11, 2017. Docket number 139 at 1. After hearing oral argument, the Court applied the May 13, 2010 date to the production of documents. However, the Court was clear that this date would remain flexible and could be modified subject to the burden on the parties. Indeed, the stipulation order concerning production of ESI indicates that "should a party discover that the search and review of the ESI within this date range is unnecessarily burdensome, then the parties agree to meet and confer on modifying the date range parameters." Docket number 138, paragraph 4(d). Therefore, defendant's contention that "producing all the documents produced in Perrin would be in contravention of the Court's January 11, 2017 order," docket number 139 at 1, misconstrues the Court's order and is without

merit.

Next, defendant has not provided any reason why the production of all nonprivileged documents produced in Perrin would be burdensome or cite any case law to support their position, nor does defendant provide any convincing reason why the documents produced in Perrin are not relevant to the instant litigation. Generally, courts allow the production of documents that are relevant to the dispute as long as production of such documents is not unduly burdensome. Federal Rules of Civil Procedure 26(b)(1). See also Agerbrink v. Model Services, LLC, No. 14 Civ. 7841(JPO)(JCF), 2017 WL 933095, at *3, (S.D.N.Y. March 8, 2017), compelling broad discovery pursuant to Federal Rules of Civil Procedure 26(b)(1) in a Fair Labor Standards Act class action.

Courts in this district have compelled discovery from prior litigation where the request is specific and relevant to the disputed issue and the prior litigation is based on similar allegations. See Lifeguard Licensing Corporation v. Kozak, 15 Civ. 8459(LGS)(JCF), 2016 WL 3144049, at *5, (S.D.N.Y. May 23, 2016) compelling production of responsive documents from prior litigations even though prior counsel possess the documents. See, also, Carter-Wallace, Incorporated v. Hartz Mountain Industries, Incorporated, 92 F.R.D. 67 at 70 (S.D.N.Y. 1981) compelling production of deposition transcripts from recently settled litigation even though depositions were subject to

protective order; cf Johnson Matthey, Incorporated v. Research Corp., No. 1 Civ. 8115 (MBM)(FM), 2002 WL 31235717, at *1-2, (S.D.N.Y. October 3, 2002) denying motion to compel discovery from prior litigation on the ground that it was not relevant to the claim or defense at issue.

Indeed, defendant does not object to the production of documents from Perrin, and the District Court in the Eastern District of Missouri granted the defendant's motion on sealed documents in that case for the limited purpose of producing such documents to plaintiffs in the instant action. Perrin, 9 Civ. 1335(AGF), (E.D. Mo,) docket numbers 456, 457.

Moreover, courts in this district have allowed discovery outside of the relevant statutory period where the documents are relevant and the production of such documents is not unduly burdensome. See Deluca v. Sirius XM Radio, Incorporated, No. 12 CV 8239, 2016 WL 3034332, at *2 (S.D.N.Y. May 27, 2016) compelling production of documents outside of the statute of limitations that were likely to be relevant; Khan v. Sanofi-Synthelabo, Incorporated, No. 1 Civ. 11423(JSM)(DF), 2002 WL 31720528, at *4 (S.D.N.Y., December 3, 2002) compelling production of documents related to company policy that predated applicable statute of limitations, where company policy was at issue, plaintiff's claim was in the statutory period, and defendant had not shown burden. See, also, Chao v. Gotham Registry, Incorporated, 514 F.3d 280 at

285 (2d Cir. 2008) noting that "the Supreme Court consistently has interpreted that the Fair Labor Standards Act liberally and afforded its protections exceptionally broad coverage."

At oral argument today, plaintiffs established, to the satisfaction of this Court, the relevance of the Perrin documents to the instant litigation. Defendant failed to identify any burden of producing the nonprivileged documents from Perrin. For the foregoing reasons, plaintiffs' motion to compel discovery is granted. Docket number 136.

Okay. So now we're going to move on to the status conference.

How is discovery going, other than that issue?

MR. FREI-PEARSON: Your Honor, it's going collegially, but much more slowly than plaintiffs would like. We're working together on the ESI protocol, or the ESI search terms. I know defendants and their counsel are working very hard on that, but we're having a back and forth on the ESI search terms which we still have not reached agreement on. I'm hopeful we will be able to reach agreement or at least narrow the differences at a point that we can come back before your Honor fairly soon. At that point, they can produce e-mail. And once e-mail has been produced, we can start taking defense's depositions. To this point, plaintiffs have only been able to take depositions on documents and data. So hopefully we will be able to move a little bit more quickly

soon. That's, I think, where it's at. They have deposed I think four plaintiffs and one-third party witness of a plaintiff, and they have another plaintiff deposition, which I believe, if we have an agreement on a date, will likely take place in April.

THE COURT: To date, you've deposed how many?

MR. FREI-PEARSON: Well, so, your Honor, we've only had one (30)(b)(6) deposition, which has been three witnesses that they designated.

THE COURT: Okay.

MR. FREI-PEARSON: They have deposed I believe -- counsel will correct me if I'm wrong -- four drivers with a fifth driver coming up in April, and a manager who put in a declaration on behalf of the driver they've also deposed.

We look forward to taking substantive depositions, but we can't until we have the e-mails, and the search terms are taking a while to resolve.

THE COURT: Okay.

MR. FREI-PEARSON: And to that end, I will want to confer more with counsel on this, but I wanted to preview for the Court that plaintiffs will likely seek relief from the close of fact discovery in July given the pace at which discovery has proceeded so far.

THE COURT: Counsel, what's your response to that?

MS. MERRILL: We would generally agree that the

parties have been working to resolve the ESI search terms in this matter. Most recently, that's resulted into broken-down searches that number more than 500. And so running the test search terms and getting results has been a more cumbersome process than we would have hoped. But we are also hopeful that the parties will be able to resolve their discussions of ESI search terms in the near term.

We have produced over 170,000 pages of documents in this matter. We've made more than 20 productions. And so defendant has -- sort of aside from the ESI subject to the search terms, defendant has been working to identify categories of documents that are responsive and to produce those on a rolling basis.

THE COURT: Okay. What do you think about the extension of time?

MS. MERRILL: Your Honor, we would have to discuss that with our client.

THE COURT: Yes. In my mind, it's too early. We're at the end of March. We have April, May, June and all of July. We have four months. I think it's way too early to know if you're going to need fact discovery extended.

I also firmly believe that you don't have a good idea -- you won't have a good idea at this time how much you're even going to need it extended. And I don't like granting extensions until I know they're really needed, one, and, two, I

know what's needed. And so I would want the parties to be able to tell me what's left.

So I understand you're anticipating needing more time. At this point, it's denied with leave to renew at a later point, after the parties have a better sense.

Now, I know you were just before, this morning, Judge Seibel, and I think that there was a request for a premotion conference to file a motion to strike the declaration of John Hall and to file supplemental declarations.

MS. MERRILL: Yes, your Honor.

THE COURT: What happened as a result of that?

MS. MERRILL: Those motions are moot as a result of the denial of conditional certification, your Honor.

THE COURT: Okay. So she denied this morning conditional certification?

MS. MERRILL: Yes, that's correct, your Honor.

THE COURT: Okay.

So the parties had a mixed day. One case went -- one decision went one way and the other decision went the other way.

Yes, counsel.

MR. FREI-PEARSON: Respectfully, the denial was without prejudice, and we believe we were given a road map. We congratulate counsel on the result.

THE COURT: Okay.

Do you have a time frame? Just so that I know how things are proceeding on that front as you're doing discovery. Do you have a time frame that Judge Seibel has said you can resubmit or it's just a --

MR. FREI-PEARSON: No time frame was given.

Plaintiffs would like to make motions as expeditiously as possible, but I'll, of course, have to consult with my clients and my colleagues.

THE COURT: Okay. Is there anything else we need to deal with today? Otherwise, I think what I'll do is schedule another conference.

MS. MERRILL: Nothing else from defense counsel, your Honor.

MR. FREI-PEARSON: No, thank you, your Honor.

THE COURT: Okay. What's your belief as the appropriate time to do the next conference?

MS. MERRILL: We believe eight weeks would make sense, your Honor. I think that reflects about what we've been doing in the case so far.

MR. FREI-PEARSON: Assuming we're able to work out the search terms, eight weeks works for plaintiffs as well.

THE COURT: So that's like the end of May, beginning of June, which I think is a good strike, because it's also halfway between that and the end of fact discovery.

So, Ms. Hummel, what's my schedule look like then?

THE DEPUTY CLERK: We could do June 1st.

THE COURT: What time? That's a Thursday?

THE DEPUTY CLERK: That's a Thursday.

THE COURT: What time?

THE DEPUTY CLERK: 10:30.

THE COURT: Does that work for everyone? That's Thursday, June 1st, at 10:30 a.m.

MS. MERRILL: Yes, your Honor.

MR. FREI-PEARSON: Subject to check, your Honor, that should work for plaintiffs. We'll immediately inform the Court if there's an issue.

THE COURT: Okay.

You really should get a pass for your phone.

MS. MERRILL: Is that in person?

THE COURT: Yes. We're going to do it in person for this case.

You come in here enough. You should get that pass so you can bring your phone in.

MR. FREI-PEARSON: I absolutely agree, your Honor.

THE COURT: Okay. So June 1st, 10:30, in person for the next status conference. Anything else, counsel?

MS. MERRILL: No, your Honor. Thank you.

THE COURT: Thank you. Have a good day.

MR. FREI-PEARSON: Thank you.

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